Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

PAUL CLARK

Petitioner,

vs.

ROY ANDERSON CORPORATION and R.A. BUILDING CORPORATION

Respondent,

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the United States Court of Appeals for the Fifth Circuit definition of a vessel too restrictive?

2. Is the question whether or not the barge involved in this case a question of fact for jury determination or proper for summary judgment?

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Appendix A--Opinion of the United States Court of Appeals for the Fifth Circuit dated August 15, 1997 . . . . . 1a

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Petitioner, Paul Clark, respectfully prays that a writ of certiorari issue to review the Opinion of the United States Court of Appeals for the Fifth Circuit entered in this matter on August 15, 1997.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is attached as Appendix A. The Summary Judgment and Memorandum Order of the District Court are attached as Appendices B and C.

BASIS FOR JURISDICTION

1. August 15, 1997 Opinion by the United States Court of Appeals for the Fifth Circuit in the case styled ***Paul Clark v. Roy Anderson Corporation and R. A. Building Corporation***, No. 96-60867 wherein the Court affirmed the District Court's Order granting the Defendant's Motion for Summary Judgment.

2. The November 12, 1996 United States District Court for the Southern District of Mississippi, Southern Division, Memorandum Order entered in the case styled: ***Paul Clark v. Roy Anderson Corporation and R. A. Building Corporation*** Civil Action No. 1:95-CV-585RR.

3. The statutory provision believed to confer on this court jurisdiction to review on a writ of certiorari the Judgment or Order in question is 28 U.S.C. § 2101(c).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the United States District Court for the Southern District of Mississippi, Southern Division, was 46 U.S.C. § 688 and the General Maritime Law.

Roy Anderson Corporation, hereinafter RAC, contracted to construct Boomtown Casino on the navigable waters of the back bay of Biloxi. The casino site, constructed on barges, was constructed on the industrial seaway in Gulfport, Mississippi. The permanent site was located on the back bay of Biloxi in Biloxi, Mississippi. On April 4, 1994, Clark was hired by RAC as a rigger at the Biloxi, Mississippi site.

Frank Jenkins, the project superintendent at the Boomtown Casino site, testified Clark was used as a rigger. Mr. Jenkins testified:

1. When moving material with a crane, Clark rigs it, hooks it up to the crane and whenever it's landed wherever it might be going, then he unhooks it.

2. The barge belonged to McDonough Marine Company.

3. The crane was loaded onto the barge. It would move on the barge and it would be tied off. It had a turn buckle or a clamp that would be tied in a knot and then it would be cabled down.

4. When the crane moved on the barge the rigger was responsible for removing the ties and replacing them.

5. One of Mr. Clark's jobs was to ensure the crane operated safely on the barge.

Clark testified his job description and duties as a rigger were:

1. We went out to the barge each day on a motor boat.

2. While at Boomtown I did not do rigging on land.

3. When material was swung to my barge it was loaded by

other riggers and then swung to my barge on the water.

4. Clark's duties included helping move the barge about the work site on navigable water. The barge was moved by a tug boat. When the tug was going to move the barge Clark would hook the tug to the barge and secure it. He would then secure the crane.

Clark was injured May 1, 1994. The crane had been leaking oil for some time and RAC had attempted to repair same, unsuccessfully. On this date oil had leaked onto the deck of the barge. The deck of the barge was wet due to rain. Clark had assisted moving the crane on the barge and when he walked around the crane he stepped into an oil patch. Both of his feet went in the air and his right foot went into a pad the crane drives on. His back hit one of the big lugs. His right foot twisted all the way around. Clark got oil all over his pants and back.

The crane was owned by RAC. Clark and the crane operators had informed Frank Jenkins that the crane was leaking.

McDonough Marine Company bare boat chartered the barge to RAC. According to John Graham, an executive vice president with McDonough Marine, this barge can be used to carry cargo, be a work platform, be used as a crane barge, buffer barge, virtually any type of use that someone needs a floating steel box. It is capable of being used in navigation and has been used in navigation over navigable waters.

Frank Jenkins testified the crane was placed on the barge for several reasons:

1. The casino was being built out over water and to reach the back side of the building could only be done by a crane on the barge.

2. The crane on the barge was used to get material to the

building. It was necessary to go onto the water in order to construct the casino.

The barge was originally stationed at another job site and moved to Biloxi along navigable waters. While at the Biloxi site the barge remained on navigable waters. (The Respondent concedes that the alleged injury occurred on the barge while on navigable waters.)

David E. Cole, a marine consultant, obtained a B.S. in Maritime Transportation from the State University of New York Maritime College and a J.D. from Loyola University of New Orleans, Louisiana. He holds an unlimited Third Mate's License and an unlimited Abled Seaman's Certificate. He spent twenty years on active duty as a commissioned officer of the United States Coast Guard, with eighteen of those years being within the marine safety specialty. He has spent the bulk of his time since 1973 investigating casualties, which includes the grounding of vessels, allisions, collisions, fires, explosions, sinkings, capsizings, personal injuries and deaths. By way of Affidavit, Commander Cole stated:

1. The barge in question has been described as a spud barge, which is a barge frequently found in all maritime environments.

2. Spud barges are a type of deck barge, which is used for the transportation of equipment and materials in all phases of the maritime community. Deck barges are used to transport pipe and material to drilling rigs, both off shore and in inland waters, for the transportation use of cranes at marine work locations, and for any other type of commodity which can be placed aboard.

3. This type barge differs from entities which are not vessels, such as painting platforms used by ship yards in that those platforms have no real transportation function, where a deck barge transports cranes, supplies, materials and various

other products as their normal occupation.

4. Mr. Clark was a member of the crew of this barge since the barge could not have performed its mission without the services performed by Mr. Clark and those working aboard it.

REASONS FOR GRANTING THE WRIT

I. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT'S DEFINITION OF A VESSEL IS TOO RESTRICTIVE.

The term "vessel" has been subject to much interpretation. The first statutory definition of vessel was formulated in 1 U.S.C. § 3 which states: "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

Over the years, the Fifth Circuit has adopted a different "vessel" status test for Jones Act purposes. The Fifth Circuit has stated the test for determining vessel status under the Jones Act is "the purpose for which the craft is constructed and the business in which it is engaged". ***Himba v. Shreveport McMoran Energy Partners Limited***, 811 F.2d 276 (5th Cir. 1987). The Fifth Circuit's definition of a vessel is much more restrictive than the one found in 1 U.S.C. § 3.

Congress intended the term "vessel" to have the meaning it established. This Court has previously held that the meaning of the terms established by Congress under the Jones Act should be enforced. ***Chandriss, Inc. v. Latsis***, 51[illegible] U.S. _____, 132 L.Ed.2d 314, 115 Sup.Ct. _____ (1995). The Fifth Circuit has restricted the Congressional intended definition of vessel. In ***Chandriss***, supra, this Court stated that leaving the definition of the Jones Act scope to the lower courts. "Unfortunately, as a result, the perils of the sea, which mariners suffer and ship owners insure against, have met

their match in the perils of judicial review."

This Court faced with the issue of whether or not a crane carrying barge was a vessel determined it was. ***Grubart, Inc. v. Great L.D. and D. Company***, 513 U.S. _____, 130 L.Ed.2d 1024, 115 Sup.Ct. _____ (1995). The Barge in Grubart, just as it is in this case, was a barge carrying a work crane. It was towed into place by a tug and once put in place lowered pins to hold it in place. This Court held:

> The place in the river where the barge sat, and from which workers directed the crane, is in the navigable waters of the United States. Thus, if Great Lakes committed a tort, it must have done it while on navigable waters. It must also have done it "by a vessel". Even though the barge is fastened to the river bottom and was in use as a work platform at times in question, at other times it was used for transportation.

The Fifth Circuit's restrictive definition of a vessel does not satisfy the remedial intent of the Jones Act and Maritime Law.

II. THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT IGNORED THE FACT THAT THE QUESTION OF WHETHER OR NOT THE BARGE INVOLVED IN THIS CASE IS A QUESTION OF FACT FOR JURY DETERMINATION AND IS NOT PROPER FOR SUMMARY JUDGMENT.

Under Rule 56(c) of the Federal Rules of Civil Procedure, the judge's function at the summary judgment stage is not himself to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether the judge is ruling on a motion for summary

judgment or on a motion for directive verdict. On a motion for summary judgment, the evidence of the nonmovant is to be believed, and all justifiable inferences that would be drawn in the nonmovant's favor. The trial court should act with caution in granting summary judgment, and may deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. ***Anderson v. Liberty Lobby, Inc.***, 477 U.S. 242, 91 L.Ed.2d 202, 105 Sup.Ct. 2505 (1986).

Who is a member of a crew and therefore who is a seaman is a mixed question of law and fact. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a member of the crew, is a question for the jury. The question of seaman status is normally for the fact finder to decide. ***Chandriss, Inc.***, supra.

A vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed or at dockside. ***Chandriss, Inc.***, supra.

Summary judgment is appropriate when the facts establish the lack of seaman status beyond question as a matter of law and no reasonable evidentiary basis exists to find seaman status. The task is to determine whether reasonable persons might draw conflicting inferences. ***Ellender v. Keva Construction and Engineering, Inc.***, 909 F.2d 803 (5th Cir. 1990).

The question of seaman status should only be removed from the trier of fact by summary judgment or directed verdict in rare circumstances. Even marginal Jones Act claims should be submitted to the jury. ***Sharpe v. Wausau Insurance Company***, 917 F.2d 885 (5th Cir. 1990).

Seaman has been defined for Jones Act purposes as an employee (1) who is permanently assigned to a vessel or who performs the substantial part of his work on the vessel and (2) whose duties contribute to the function of the vessel and the

accomplishment of its mission. ***McDermott International v. Wealander***, 598 U.S. _____ 112 L.Ed.2d 866, 111 Sup.Ct. 807 (1991). The question of whether a floating structure is a vessel is fact specific and is usually left to the jury. ***Southwest Marine v. Gizoni***, _____ U.S. _____ 116 L.Ed.2d 405, 112 Sup.Ct. 846 (1991).

Clark and his employers have testified that he was assigned to the barge and the crane as a rigger. All have testified that his duties contributed to the function of this vessel or to the accomplishment of its mission.

To defeat vessel status the District Court and subsequently the Fifth Circuit Court of Appeals, which did not issue an opinion and therefore is bound by the District Court judge's findings, determined that this was a work platform and not a vessel constructed or designed for the transportation of passengers, cargo or equipment across navigable waters. However, this finding is directly in conflict with the only individual who testified concerning this issue, Mr. Graham. Mr. Graham, whose company's bare boat charters these barges has testified that this is a barge that is used to carry cargo and used in navigation over navigable waters. David E. Cole, Plaintiff's expert, stated, by Affidavit, that this is a vessel and not a work platform.

Clark sustained his burden to present sufficient facts which would require that the District Court judge to allow a jury to make the determination whether or not the barge in question was a vessel and Clark a seaman.

In ***Coats v. Penrod Drilling Corporation***, 511 F.3d 113 (5th Cir. 1995) that Court stated:

> The Jones Act, as Welfare legislation (the express Congressional purpose of the Jones Act was to provide for the welfare of seamen) is entitled to a liberal construction to accomplish its beneficent

purposes.

Petitioner respectfully requests that this Honorable Court grant his Petition for Certiorari.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that a Writ of Certiorari issue to review the decision below.

Respectfully Submitted,

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APPENDIX A --OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED AUGUST 15, 1997.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-60867

PAUL CLARK

Appellant

V.

ROY ANDERSON CORP. and R.A. BUILDING CORP.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 1:95CV-585-R-R
District Judge: Honorable Dan M. Russell, Jr.

Before: KING, HIGGINBOTHAM, AND DUHE,
Circuit Judges.

PER CURIUM:[1]

Paul Clark has appealed the district court's order granting the defendants' motion for summary judgment and dismissing his tort claims under the Jones Act and General

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[1]Pursuant to the 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Maritime Law. Clark contends that the district court erred in determining that the spud barge on which the alleged injury occurred was not a "vessel" for purposes of the Jones Act. Clark also contends that the district court erred in determining that it did not have jurisdiction under General Maritime Law to entertain the tort claim. We have carefully reviewed the record and the briefs, and, essentially for reasons stated by the district court, **Clark v. Roy Anderson Corp.**, No. 1:95-CV-585RR (S.D. Miss. Nov. 12, 1996), we AFFIRM the district court's order granting the defendants' motion for summary judgment.

AFFIRMED.

APPENDIX B--SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DATED DECEMBER 11, 1996

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:95-CV-585-RR

PAUL CLARK

V.

ROY ANDERSON CORPORATION,
JOHN DOE AND R.A. BUILDING CORP.

SUMMARY JUDGMENT

RUSSELL Dan M., Jr., U.S. District Judge

This cause having come before the Court on the Motion for Summary Judgment of the defendant, Roy Anderson Corp. and R.A. Building Corporation, and the Court, being fully advised in the premises, and having filed herein on or about November 12, 1996 its Memorandum Order, which Memorandum Order is incorporated herein by reference.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the Motion for Summary Judgment of the Defendants, Roy Anderson Corp. and R.A. Building Corporation be, and it is, hereby granted.

Appendix B

IT IS FURTHER, ORDERED AND ADJUDGED, that Summary Judgment be, and it is, hereby entered in favor of the Defendants, Roy Anderson Corp. and R.A. Building Corporation and against the Plaintiff, at the cost of the Plaintiff, for which let execution issue.

SO ORDERED AND ADJUDGED, this the 10th day of December, 1996.

s/ Dan M. Russell, Jr.
DAN M. RUSSELL, JR.,
U.S. DISTRICT JUDGE

Approved as to form only:
s/Woodrow W. Pringle, III
WOODROW W. PRINGLE, III
ATTORNEY FOR PLAINTIFF

s/James O. Dukes
JAMES O. DUKES
ATTORNEY FOR ROY ANDERSON CORP.

s/Joseph B. Guilbeau
JOSEPH B. GUILBEAU
ATTORNEY FOR R. A. BUILDING CORPORATION

APPENDIX C--MEMORANDUM ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, SOUTHERN DIVISION DATED NOVEMBER 12, 1996

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 1:95-CV-585-RR

PAUL CLARK

V.

ROY ANDERSON CORPORATION,
JOHN DOE AND R.A. BUILDING CORP.

MEMORANDUM ORDER

RUSSELL, Dan M., Jr., U.S. District Judge

This matter is before this Court on Motion of the defendants, Roy Anderson Corporation ("RAC") and R.A. Building Corporation ("RAB"), for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure for the reasons that plaintiff's allegations and undisputed material facts fail to establish any liability under the Jones Act.[1]

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[1]The Jones Act, 46 U.S.C., Section 688, provides: "any seaman who shall suffer personal injury of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United

Appendix C

The Plaintiff has also asserted pendent claims against third party defendants in this cause. RAC and RAB further move this Court to dismiss any and all such claims since summary judgment on the Jones Act issue will dispose of federal question jurisdiction, and the Court would lack the requisite subject matter jurisdictions over such pendent claims since the parties are not diverse.

I. FINDINGS OF FACT

On May 1, 1995, plaintiff worked as a crane rigger at the Boomtown Casino construction site. On that date plaintiff alleges he slipped and fell on an oil patch while working on a barge thus causing him to injure his foot and leg. Plaintiff has brought this claim against RAC and RAB for Jones Act negligence, unseaworthiness, and maintenance and cure. In order to successfully bring these claims, plaintiff must prove his status as a "seaman." **See Pavone v. Mississippi Riverboat Amusement Corp.**, *52* F.3d 560 (5th Cir. 1995). It is this issue of "seaman status" that must be resolved.

States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; in the case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

Appendix C

A key determinant in establishing seaman status is whether the facility in which plaintiff was assigned to work is considered, as a matter of law, a "vessel." The plaintiff presumably alleges that the barge upon which he performed his rigging duties is in fact a "vessel." In 1995, the Fifth Circuit opined in **Pavone** that the BILOXI BELLE was an indefinitely moored floating casino, removed from navigation, and was a work platform at the time of the alleged accidents, and therefore, was not a "vessel" for purposes of the Jones Act or general maritime law. In the case sub judice the plaintiff apparently intends to assert that the crane barge used in the construction of Boomtown Casino[2] is a Jones Act "vessel," and therefore satisfies the "vessel" prong necessary to determine "seaman" status. The defendants RAC and Rab submit that the crane barge upon which the plaintiff performed his rigging duties was a work platform and not a "vessel" as a matter of law.

The crane barge on which the plaintiff alleges he was injured was used in the construction of the Boomtown Casino. It was used for construction purposes on the navigable waters of Biloxi's back bay. At the time of plaintiff's alleged injury, he was assisting the crane in reaching some materials. Paul Clark depo. p. 65, line 23 - p. 66, line 15. Other than being moved from time to time by means of tug boat to other areas immediately within the construction site, the crane barge was at all other times

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[2]The status of Boomtown Casino as a "vessel" is not an issue in this case. Boomtown Casino would clearly be adjudicated a "non-vessel" based upon the Fifth Circuit's holding the BILOXI BELL to be a non-vessel in **Pavone.**

stationary. Paul Clark depo. p. 30, lines 8-25. The crane barge was securely held in place by two large pilings ("big pins") which went down into the dirt. Paul Clark depo. p. 30, lines 17-25.

The plaintiff submits that the barge in issue was a vessel for purposes of the Jones Act as generally it has been described as a "spud" barge which is a barge frequently found in all maritime environments. It is non self-propelled and requires a towing vessel for its movement. Furthermore, the plaintiff argues that the barge in question was a raked bow and that a raked bow is one designed to help the barge cut through the water. Citing Graham depo., p. 20. The barges were leased by McDonough Marine to RAC and are the same type barge upon which the crane was placed. Plaintiff noted that after leasing the barges to RAC, it makes arrangements for transporting the barges to its work location. Graham depo., p. 15. The plaintiff further submits that the barges are used in all types of maritime activity over navigable waters including the transportation of cargo, as work platforms, crane barge, buffer barge, and virtually any type of use for which someone needs a floating steel box. Graham depo. p. 13.

II. CONCLUSIONS OF LAW

Summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). **See Anderson v. Liberty Lobby**, 477 U.S. 242, 248 (1986); **St. Amant v. Benoit**,

806 F.2d 1294, 1296-1297 (5th Cir. 1987). The non-moving party to successfully defeat a summary judgment motion must establish a key element in this case which, as a matter of law, placed liability on the moving party. **Celotex Corp. v. Catrett**, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552 (1986). Although the issue of determining whether a person is a "seaman" is normally a question for the jury, the "issue may be resolved by summary judgment where the undisputed material facts establish as a matter of law that an individual is not a Jones Act seaman." **Barrios v. Engine & Gas Compressor Services, Inc.**, 669 F.2d 350, 352 (5th Cir. 1982).

In Clark's claim for Jones Act benefits, the burden of establishing seaman status rests with him. **See Billings v. Chevron, U.S.A., Inc.**, 618 F.2d 1108, 1109 (5th Cir. 1980) ("in order to establish Jones Act jurisdiction, Plaintiff must show that at the time of his injury he was a seaman on a vessel...."); **Daniel v. Ergon, Inc.**, 892 F.2d 403, 407 (5th Cir. 1990)(holding that the "existence of a vessel is a 'fundamental prerequisite to Jones Act jurisdiction' and is at the core of the test for seaman status"). All the tests for Jones Act seaman status have varied slightly in terminology; the undisputed criteria are as follows:

(1) [H]e must have a more or less permanent connection with,

(2) a vessel in navigation, and

(3) the capacity in which he is employed or the duties which he performs must contribute to the function of the vessel, the accomplishment of its mission or

its operation or welfare in terms of its maintenance during its movement or during anchorage for ports future trips.

Bernard v. Binnings Construction Co., Inc., 741 F.2d 824, 827 (5th Cir. 1984)(citing **Barrios**, 669 F.2d at 352; **Watkins v. Pentzien, Inc.**, 660 F.2d 604, 606 (5th Cir. 1981), **cert. denied**, 456 U.S. 944 (1982).

The United States Court of Appeals for the Fifth Circuit has repeatedly stated the test for determining vessel status is "the purpose for which the craft is constructed and the business in which it is engaged." **Hemba v. Freeport McMoran Energy Partners, Ltd.**, 811 F.2d 276, 277 (5th Cir. 1987) (citing **Blanchard v. Engine and Gas Compressor Servs., Inc.**, 575 F.2d 1140, 1142 (5th Cir. 1978)). As can be seen, the fifth Circuit definition of a vessel is much more restrictive than the one found in 1 U.S.C. Section 3. A structure may be considered a vessel if its design or use is "transportation of passengers, cargo or equipment across navigable waters." **Hemba**, 811 F.2d at 277 (quoting **Cook v. Bleden Concrete Products, Inc.**, 472 F.2d 999, 1002 (5th Cir.), **cert. Denied**, 414 U.S. 868 (1973) (stating that some movement, both perpendicular and lateral was necessarily part of regular operation of floating dry docks and similar structures and holding that such structures were not "vessels" as a matter of law).[3]

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[3]In Cook, the Fifth Circuit went on to state that "capability" to sustain such movement has been held insufficient to establish that such craft are constructed for the purpose of navigation." 472 F.2d at 1102, citing **The Robert Parsons**

Appendix C

In applying the criteria in the Fifth Circuit's test to the instant case, the crane barge upon which the plaintiff performed his rigging duties is not such a conventional vessel. In **Ellender v. Kiva Constr. & Engineering, Inc.**, 909 F.2d 803 (5th Cir. 1990), considered whether a crane rigger who initiated a Jones Act suit against his employer was in fact a Jones Act seaman. The Fifth Circuit held that the four barge platform assembly, which included the barge upon which the laborer working when injured, was not a Jones Act vessel, and therefore the rigger was not a Jones Act seaman. The Court held that to qualify as a Jones Act seaman, a person must have worked on a "vessel." **Ellender**, 909 F.2d at 806. The **Ellender** court reiterated its previous holdings in regard to the vessel status test - "the purpose for which the craft was built and the business in which it was engaged." The court further held that "[o]ther factors like the structure's size, its ability to float, its permanent fixation to the shore or the bottom, and its movement or its ability to move across navigable waters are inconclusive." **Ellender**, 909 F.2d at 806, citing **Bernard**, 741 F.2d at 829; **Cook**, 472 F.2d at 1000-1001 (5th Cir.), **cert. denied**, 414 U.S. 868, 94 S.Ct. 175, 38 L.Ed 2d 116 (1973). Moreover, "structures whose primary function is non-navigational or non-transportational may still qualify as vessels, if the structure was involved in navigation at the time of the injury." **Ellender**, 909 F.2d at 806 citing **Bernard**, 741 F.2d at 829; **Cook**, 472 F.2d at 1002. The court went on to state that based upon these established principles, the Fifth Circuit has routinely held, as a matter of law, that neither a single construction barge nor several barges strapped together to form a floating platform constitute "vessels" under the Jones

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[Perry v. Haines], 191 U.S. 17, 30, 24 S.Ct. 8, 12, 48 L.Ed. 73 (1903).

Appendix C

Act. **Ellender**, 909 F.2d at 806, citing **Waguespack v. Aetna Life & Cas. Co.**, 795 F.2d 523, 526 (5th Cir. 1986), **cert. denied**, 479 U.S. 1094 (1987). The court summarizes rationale behind this decision in **Bernard**, 741 F.2d at 831:

A review of these cases indicated three factors in common to them:

1. the structures involved were constructed and used primarily as work platforms;

2. they were moored or otherwise secured at the time of the accident; and

3. although they were capable of movement and were sometimes moved across navigable waters in the course of normal operations, any transportation function they performed was merely incidental to their primary purpose of serving as work platforms.

See Daniel, 892 F.2d at 804, 407.

Finally, the court in **Ellender** stated that where a barge is not designed or used to transport passengers, cargo or equipment from place to place across navigable waters, where the barge required tug boats or other vessels to move it, and where the barge remained virtually stationary during any particular project, the barge would not qualify as a Jones Act vessel. **Ellender**, 909 F.2d at 806, citing **Ducrepont v. Baton Rouge Marine Enterprises, Inc.**, 877 F.2d 393, 395 (5th Cir. 1989) (holding that structure may be nonvessel for Jones Act purposes even if it fails to meet each criteria common to

structures previously found not to be Jones Act vessels.) Thus, the **Ellender** court found that the spud barge which support a large mobile crane and other work equipment needed to build the oil platform was built primarily to serve as a work platform, and that the barge's "transportation function" were merely incidental to its other uses. **Ellender**, 909 F.2d at 807.

In both **Ellender** and in the instant case, the barge supported a crane which was used primarily for construction purposes. **Compare Ellender**, 909 F.2d at 807 and Paul Clark depo. p. 30, lines 8-16. Similar to the barge in **Ellender**, the crane barge was moved from time to time by tug boats in order to facilitate the ongoing construction at their respective sites. **Compare Ellender**, 909 F.2d at 805 and Paul Clark depo. p.28 line 1 - p. 30, line 25. Likewise, the crane barge in the case sub judice was neither designed for navigation nor engaged in navigation at the time of the accident. The mere fact that the crane barge was moved from time to time via a tug boat, does not provide the requisite threshold in order to make a crane barge a Jones Act "vessel" for performing these incidental "transportation functions." **Ellender**, 909 F.2d at 807.[4] **See also, D. Canale Food Services, Inc. v. Splash Casino and Resort, Inc., et al.**, Civil Action No. 2:95-CV-70-B-A (N.D. Miss.) (Memorandum Opinion dated October 25, 1995((vessel being towed incapable of being used as a means of transportation on water, i.e., casino was not a vessel for

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[4]Similar to the facts in **Ellender**, the plaintiff was transported to and from the barge by means of "a little old motor boat" (**Compare Ellender**, 909 F.2d at 807 and Paul Clark depo. p. 24, line 4) or by means of a "long board"/gang plank. Paul Clark depo. p. 24, lines 14-25.

purposes of a maritime lien and court lacked admiralty jurisdiction over the claim).

In the plaintiff's brief in opposition to the defendants' Motion plaintiff alleges that the defendants have only argued that plaintiff is not a Jones Act seaman because the barge in question is not a vessel. Plaintiff argues that the complaint clearly provides a claim for Jones Act relief as well as general maritime law recovery. Specifically, the plaintiff cites the court to **Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.**, 513 U.S. ____, 115 S.Ct. 1043 (1995). The defendants submit that the plaintiff cannot now assert claims for negligence under general maritime law and the complaint does not allege such. See plaintiff's amended complaint. Furthermore, the plaintiff's complaint sets forth that he bring his cause of action under the Admiralty Act. It is unclear which exact act this is and the Jones Act. See plaintiff's complaint, para. X. Defendant RAC submits that it is not clear whether in fact the plaintiff actually pled on unseaworthiness claim under the Jones Act but has read the complaint literally to include such a claim.

In addressing the plaintiff's allegations in his brief that he has alleged general maritime law claims, the Court still does not find that the defendants' motion should not be granted. The plaintiff argues that **Grubart, supra**, requires that this Court allow plaintiff to proceed on general maritime claims as in that case the barge in fact was considered a vessel. A review of the case reflects that the petitioners therein did not dispute the conclusion of the lower court's below which had apparently held that the barge was a vessel for admiralty tort purposes. **Id.** at 1409. Rather, the issue before the Supreme Court in **Grubart** was whether "a Court of the United States ha[d]

admiralty jurisdiction to determine and limit the extent of" the defendant, Great Lakes, tort liability under the Limitation to Liability Act. **Grubart**, 115 S.Ct. At 1046. The Court in **Grubart** discussed the traditional "situs" and "nexus" test necessary to confer admiralty jurisdiction in conjunction with the Admiralty Extension Act.

Furthermore, the barge in **Grubart** was used "at other times... for transportation." **Id**. Such is not the case before this court relative to the barge in question. It has been determined that any transportation function which the barge before the Court served, if any, was purely incidental to its primary use as a work platform. It is not the dispute that the barge required the use of a tug boat to be moved. There is nothing before the Court to show that the barge was used in maritime activity and for the purpose of this suit was only be used as a work/construction platform.

The Plaintiff also cites the Court to **Coats v. Penrod Drilling Corp.**, 5 F.3d 877 (5th Cir. 1993), in which the Court held that an injury aboard a vessel which functioned as a jack-up drilling rig on navigable waters was maritime activityith effect on maritime commerce, thus conferring admiralty jurisdiction. This case is again distinguishable from the situation before the Court herein whereas similar to **Grubart, supra**, there was no apparent question in regard to vessel statutes. In **Coats** the court applied the four Kelly factors which are (1) the function and the roles of the parties, (2) the types of vehicles and instrumentalities involved; (3) the causation and type of injury; and (4) traditional concepts of the role of admiralty law. Said factors are used to determine whether admiralty jurisdiction should be invoked and general maritime

law should be applied. **Id**. In the instant case, the Court agrees that application of the four Kelly factors clearly shows that this is not a case that has any substantial relationship to traditional maritime activities. Regarding the function and roles of the parties, RAC and RAB are both engaged in the construction business. Boomtown Casino has been held, pursuant to **Pavone, supra**, as not a vessel. Thus they were not functioning in traditional maritime related activities. **See Also, Coats**, 5 F.3d at 885.

In considering factor two -- the types of vehicles and involved -- again as in **Coats**, the injury occurred upon a vessel in navigable waters. Such is not the case, and the nexus which strengthened the connection to admiralty jurisdiction in **Coats** is not present herein.

As regards the third factor -- causation and type of injury -- the plaintiff did not suffer from a tort which would be considered uniquely maritime, thus not in any way favoring or conferring admiralty jurisdiction.

Finally, considering the fourth factor -- traditional concepts of the role of admiralty -- allegations concerning incidents occurring on a vessel are not present here. **See Molett v. Penrod Drilling, Co.**, 826 F.2d 1419 (5th Cir. 1987), **cert. denied**, 493 U.S. 1003 (1989) (the Court in **Penrod** focused on the fact that the tort occurred upon a vessel).

Finally, the plaintiff has cited **Molett, supra**, as support for admiralty jurisdiction, which applies three additional factors to the Kelly test, which include:

Appendix C

1. The impact of the event on maritime shipping and commerce.

2. The desirability of a uniform national rule to apply to such matters.

3. The need for admiralty expertise in the trial and decision of the case.

Yet, in considering these additional three factors, it is this court's opinion that the plaintiff's claim is not the type of tort claim to which general maritime law applies. Mr. Clark's alleged slip and fall injury on a barge on the back bay of Biloxi could hardly be considered to impact maritime shipping and commerce. There is no need for a uniform national rule in this case since the construction of indefinitely moored casinos over navigable waters is unique to the State of Mississippi and since the Fifth Circuit has already stated that the casinos are not vessels as matter of law. Thirdly, there is no need for admiralty expertise in the trial and decision in this case since the alleged incident - slip and fall - is not unique to the general maritime law.

The plaintiff has also submitted the case of **Complaint of Tom-Mack, Inc. v. Biela**, 76 F.3d 678 (5th Cir. 1996). In said case, the original complaint alleged that a charter was an owner and operator of a fleet of vessels, including a barge, and that on occasion the vessels in question were operated in furtherance of the charter's business at the time of the accident. A review of this case reflects that it is inapplicable to the matter before this Court. In **Tom-Mack**, the Limitation of Liability Act, § 46 U.S.C.A. 181, **et seq.**, was at issue; yet, the question

of vessel status under the Limitation of Liability Act is considerably more broad in the determination of vessel status than under the Jones Act. Furthermore, in **Tom-Mack**, the court held that "reasonable possibility" existed as to whether the barge in **Tom-Mack** was in fact a vessel under the Limitation of Liability Act. **Id.** At 683. The Court, however, neither held that the barge in **Tom-Mack** was a vessel under the Limitation of Liability Act, nor did it state that there was any probability that the particular barge was in fact a vessel for the purposes of the Limited Liability Act. Thus, the Court does not find this case persuasive to a determination of the issues before it.

Accordingly, this Court is of the opinion that the crane barge is, as a matter of law, not a vessel; and, the plaintiff, as such, cannot be a seaman, and his claim for Jones Act negligence, seaworthiness and maintenance and cure must fail.

IT IS, THEREFORE, ORDERED AND ADJUDGED that the Motion of the defendants, Roy Anderson Corporation and R.A. Building Corporation, for Summary Judgment is hereby GRANTED, and the Complaint filed in this cause is hereby DISMISSED.

SO ORDERED AND ADJUDGED this the 8th day of November, 1996.

s/Dan M. Russell, Jr.
DAN M. RUSSELL, JR.
UNITED STATES
DISTRICT JUDGE